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No. 303.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF RESPONDENT.

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of Hutchinson, Kansas,
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(34,434)

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STATEMENT.

This action was brought under the Federal Liability Act by Mrs. Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, for the benefit

of herself and her daughter as the surviving wife and daughter of M. G. Toops, who was killed while in the employ of the Santa Fe Railroad Company on the 13th day of August, 1926, at Rolla, Kansas. Petitioner admitted that Conductor Toops was engaged in interstate service and that the action was properly brought under the Federal Liability Act. The case was thoroughly tried, all the evidence was introduced and heard by the court and jury, the court fully instructed the jury as to the law of the case, and the jury returned their verdict and special findings of fact, basing the same on ample testimony. The petitioner's motions for judgment and for a new trial were overruled and judgment rendered on the verdict in favor of respondent. The Railroad Company appealed from the judgment rendered, and the Kansas Supreme Court affirmed the judgment of the lower court, the case being reported in 128 Kan. 189. Three justices dissented, and Mr. Justice Burch wrote a dissenting opinion. The opinion of the court is incorporated in the record, beginning at page 91 and ending on page 106. The dissenting opinion by Mr. Justice Burch will be found in the record, pages 106 to 116, and it is also incorporated in petitioner's brief, pages 38 to 48.

For convenience and in order to aid the court, we have classified and enumerated the uncontradicted and admitted facts shown by the evidence in this case, by paragraphs. We have done this because the petitioner has incorporated in its brief a statement of facts which we deem wholly insufficient and lacking in many of the essential details which were established

by the evidence and considered by the trial court and jury. The petitioner apologizes for its meager statement of facts in the following language in its brief (p. 13):

> "In our statement of facts it would seem as though the statement was a very brief one, and yet we think that this statement contains all the pertinent evidence as to the essential facts attending the death of Toops. Of course, evidence was introduced on various collateral matters, but we think that our statement contains the really essential facts."

(a) Conductor Toops was killed on August 13, 1926, at Rolla, Kansas, a station on the Dodge City-Elkhart branch of the petitioner's lines, about 12:30 to 12:45 o'clock in the morning. The night was very dark.

(b) At the time of his death Conductor Toops had been in the service of the Santa Fe Railroad Company for a period of 13 years, or more, and during the 4 or 5 years immediately preceding his death he had been engaged in the passenger train service out of Kansas City, Missouri, and on a different division of the Santa Fe from where the accident took place.

(c) The trip from Dodge City to Elkhart on August 12, was his first trip over that line for a period of approximately thirteen years.

(d) The freight train on the way down from Dodge City to Elkhart did not stop at Rolla, and Conductor Toops therefore had no opportunity to inspect the elevator track at that station (R. 22).

(e) Rolla, Kansas, is a station on the Elkhart-Dodge City branch, with a population of less than 200,

and contains in addition to the main line track, a passing track, a house track and an elevator track running in a general east and west direction through a pronounced cut which, on the south side, resulted in a bank some 8 or 10 feet high close to the main line track on the south side and extending along the elevator track to the south from the main line track so that a person on the elevator track at the derail switch or immediately west thereof or immediately east thereof, is invisible to a train crew operating on the main line east of the elevator switch. This cut is shown by photographs contained in the record on pages 85 and 86.

(f) Conductor Toops was acquainted with Mr. Hall, the engineer, and with Mr. Phillips, his fireman, but had never before seen either one of the brakemen on his freight train.

(g) When they arrived at Rolla on their way back to Dodge City the engine stopped near the depot. Mr. Nolan was the head brakeman and was on the engine. Conductor Toops and Hemphill, the rear brakeman, were in the caboose and they got off of the train, one going on one side and one on the other until they came to the depot. Four empty cars which had been picked up at Wilburton, a station between Elkhart and Rolla, were sent with the engine eastward and were backed in on the elevator track and attached to 5 cars loaded with grain standing on the elevator track. Nolan, the head brakeman, went with the engine and empty cars, and Hemphill went across to the elevator track and assisted in the coupling up

of those cars for their movement out on to the main line track. Those cars were brought back and Conductor Toops coupled them to the train standing on the main line track. The engine went forward with Mr. Nolan, the head brakeman, and was switched on to the passing track from the main line, came back and pushed the cars together that were fouling the cross-over switch east of the depot. Hemphill left Toops near the depot platform and went over and coupled up the stock cars. 5 of the 15 grain cars on said passing track west of the stock cars, were west of a highway crossing which was kept open. The grain cars east of the crossing were pushed back and were coupled with those 5 cars west of the road crossing, and the whole train was pulled out over the cross-over track on to the main line.

(h) When this train of 27 cars was pulled on to the main line and the cross-over switch closed, Brakeman Nolan was still on the front end of those cars. Hemphill was somewhere near the rear end thereof. The elevator track left the main line and ran on a curve in a southwesterly direction along the high bank, 8 to 10 feet high, which extended eastward along the line of the 27 box cars attached to the engine on the main line track. Neither the engineman nor the brakemen from their positions could see around the curve on account of the high bank.

(i) Nolan, the head brakeman, testified (R. 23 and 24), and his testimony is substantiated by all the other members of the train crew, as follows:

"There was nobody on the fifteen moving grain cars when they were cut loose from the stock cars and speeded back on this elevator track. Nobody in control of them. They were not lighted in any way. There was no light on the west end of those fifteen grain cars that were moving west. There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely his lamp signals that I was working by, and I was unable to see Mr. Toops on account of the curve there and the cars pointing on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that 'L' and the curve that is there. If he had been beyond that I couldn't have seen him from where I was working. Mr. Hemphill's kick-in signal could not have been seen from the derail to where Mr. Hemphill was standing. *The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from.* There was no whistle signal given, and I don't believe the bell was rung. I wouldn't want to say for sure because the bell is something you can't very well hear if the cars are moving at the distance I was from the engine. It may have been ringing, but I don't remember if it was. The engine whistle wasn't blown at any time after we started switching in the yard until it was blown to call the agent after we found Mr. Toops' body."

(j) Hemphill, the rear brakeman, gave a kick-in signal to Nolan and the enginemen, but the first attempt to kick-in was not successful because Nolan was too slow in getting on the cars and cutting the 15 grain cars off from the 12 stock cars, and a second

signal was given. The cut was successfully made at the second signal and both brakemen remained with the 12 stock cars and the engine and sent the 15 grain cars down the main line track and onto the elevator track with no one on them or in control of them.

Admitted Facts Showing How Conductor Toops Met His Death.

(k) Toop's body was found between the rails of the elevator tracks at the derail with his shoulders jammed against the derail, his body lying diagonally across the track between the rails, with his feet to the east and north, his head and right arm, mashed off by the wheels of the cars, and his hat, were lying south of the south rail of the elevator track near the derail. Rule 471 (R. 84) reads as follows:

> "They (the conductors) must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of *derailing switches* and know they are right before attempting to pass them."

Conductor Toops' lantern and lead pencil were lying together south of the elevator track about 2 or 3 feet away from the south rail of the track, his lead pencil lying between his lantern and the south rail. His train book, a large fold, containing 34 or 35 bills, was found lying in the center of the track between the rails (R. 38). The surface of the track between the rails showed clearly that the body of Conductor Toops was dragged westward 2 or 3 feet until his shoulders were jammed against the derail.

4 or 5 cars passed over his body and were standing west of the derail where they stopped for lack of momentum.

(1) Nolan and Hemphill after kicking in the 15 grain cars on the elevator track, then kicked in the 12 stock cars on the passing track with the grain cars. Nolan remained with the engine and closed the cross-over switch at the main line, and coupled the engine when it ran back to the east end of the 15 grain cars standing one or two car lengths west of the cross-over switch on the main line, and then got up on the train. While he was doing this Hemphill set the brakes on the stock cars when they were clear of the cross-over switch connecting with the passing track; then got off of the cars and went south and got on the string of 15 grain cars standing on the elevator track. He gave a go-ahead signal but the enginemen did not see it. The engine was not then coupled on to the cars. Nolan, after coupling the engine to the cars, climbed on the front end of the standing cars and Hemphill repeated the signal, Nolan relayed it to the engineer, and the train started westward pushed by the engine.

Nolan walked to the second car west from the engine and on to the south side of the roof thereof in order to better signal to the engineer. They ran a few car lengths when Nolan saw Conductor Toop's lantern lying south of the track, and gave a washout or emergency signal apprehending that something was wrong. The train stopped within a car length. Nolan got off and discovered Toops' arm, head and hat, also

his lantern and lead pencil, lying between it and the track, south of the track. Nolan's lantern had gone out in his rapid descent off of the car and he made a mark with his heel by the side of Toops' lantern and picked it up and looked for his body and found it lying under the engine in the position hereinbefore described. Blood was found on all of the cars except the first car on the west end of said string of 15 cars.

(m) There was a highway crossing which ran approximately north and south over all of the tracks at Rolla station, about 4 or 5 car lengths west of the depot, as shown by the evidence of Hepmhill and Nolan. Hemphill, while speaking of coupling up the stock cars and grain cars which were standing on the passing track north of the depot, said (R. 30): "There was one road crossing cut in the grain cars; otherwise they were coupled together." Nolan testified (R. 23): "There was a road crossing back there that was cut. There was another coupling back between the engine and the road crossing. The road crossing was west of the depot about 4 or 5 car lengths."

(n) There were no switch lights at Rolla station nor any yard limit signs (R. 37).

(o) There was no lighted lantern on top of those 15 grain cars. Hemphill testified (R. 38): "When I got up on top of those 15 grain cars there was nobody else on top so far as I saw. There wasn't any lantern there. If there had been a lantern up

there I would have seen it unless the person had it behind him or hid in some way. You could see anyone with a lighted lantern on top of any of those 15 cars."

Conductor Toops' Movements After He Had Coupled Up the Five Grain Cars to His Train on the Main Line.

(p) Conductor Toops remained on the station platform going through his switch list after he had coupled up the 5 grain cars above mentioned. Mr. Nolan, the head brakeman, saw Toops on the platform at the time the 27 stock cars and grain cars were pulled out on the main line over the cross-over switch (R. 24). Hemphill, the rear brakeman, saw Toops on the east end of the platform with his lantern on a truck and his train book in his hand, looking through his switch list (R. 35).

The derail on the elevator track where Toops' body was afterwards found, is about 300 feet east of the depot. There is a path on the south side of the main line eastward from the depot. The elevator track at the derail is skeletonized. Mr. Bryan, witness for the respondent, testified (R. 81) that there was possibly a gallon of dirt between the ties. Thistles and weeds had grown up between the ties at that place and obscured the real condition of the track.

Dr. H. J. Duvall testified (R. 56):

"I am a practicing physician. Have been for thirty-one years. In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad,

including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

Company Rules for Switching Cars at Stations.

(q) A book of rules prepared by petitioner and issued to trainmen for their government in handling trains, was introduced in evidence. The definitions of "station" and "yard" were especially referred to in the evidence by petitioner, and read as follows (R. 28):

> "Station—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.
>
> "Yard—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by timetable, or by train order, may be made, subject to prescribed signals and regulations."

The undisputed evidence showed that Rolla is a station and comes under the first definition given above.

Conductor's Duty at Stations.

(r) The following rules defining the duties of conductors at stations and especially referred to at the trial, read as follows (R. 84-85):

> "Rule 381. Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the

prompt performance of work and rules will permit.

"Rule 396. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by station agents to do such work, and the same will be performed. Conductors when at stations doing work will attend personally to the switching unless engaged in checking the unloading way-freight as provided in Rule 389, when they may allow brakeman, if competent, to do the switching.

"Rule 398. When cars are taken on at intermediate stations, they must be carefully examined. They must see that cars already on sidings, as well as those set out by them, are safely and properly left. Cars or engines must always clear the main or other adjoining tracks a safe distance.

"Rule 471. They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of derailing switches and know they are right before attempting to pass them.

"Rule 483. They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear or train engineman will promptly signal flagman as per Rule 14 c."

(s) The following are the company's rules to be observed by trainmen in stations while switching and moving cars in such stations, to-wit (R. 51):

"Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the enginemen in case of need.

"Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so going.

"Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (Rule 14 provides for two distinct whistles). .

"Sec. 478. They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

"Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

ARGUMENT.

The foregoing statement of facts is practically the same as the statement of facts set out in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, and differs only in this, that we have eliminated the arguments set out on pages 12 and 13 which were incorporated in said statement of facts. Respondent, still relying upon the argument made in her Brief in Opposition to the Petition for Writ of Certiorari and the cases cited therein, submits for the consideration of the court the following additional argument in reply to the two points raised by the petitioner in its final brief (p. 13) namely:

> First: "That the negligent acts found by the jury in the original trial of this case were not shown to be the proximate cause of the death of Toops. In other words, admitting that the company was guilty of the acts found by the jury, and that those acts were negligent, yet there is no evidence that such negligent acts were the cause of Toops' death."
>
> Second: "It is the contention of petitioner that under the decisions of this court and of the Federal courts generally, the acts complained of and found by the jury were not negligent acts as a matter of law."

Both of the questions raised by the petitioner may well be argued together. A careful reading of the testimony in this case shows that the petitioner was guilty of actionable negligence, and that the general verdict of the jury and its special findings in favor of the re-

spondent were properly sustained by the Supreme Court of Kansas. The acts of negligence committed by the petitioner as shown by the evidence, may be briefly stated as follows:

First, the kick-in of 15 grain cars with no one on them to control them or stop them in case of danger.

Second, no light was on the front end of the moving cars.

Third, no kick-in or push signal was given by the engineer by blowing the whistle.

Fourth, the bell was not rung as a warning to any person who might be upon the elevator track.

Fifth, the track was defective at the derail where Conductor Toops was killed, in this, that the ties were practically without ballast or dirt filling between them, and weeds and thistles had grown up between the ties and about the track. It was a skeletonized track and so dangerous as to require extraordinary care for any trainman or other person to cross it without accident on a dark night.

Sixth, the elevator track curved from the main line in a southwesterly direction around a high bank, which was about 8 or 10 feet high (see photographs, Record 85 and 86). Special reference to Exhibit 5, (Record 86), looking westward down the main line track, shows the height of the bank as compared with the depot and elevators on the south side, and gives a clear idea of the extent of the curve of the track from the main line to the elevators. It also shows the depth of the cut through which the main line and passing track

run, there being a white fence on the right (north) side of the track.

Seventh, Conductor Toops, as we have seen, saw this track by the aid of the light from his lantern for the first time in thirteen years.

A reading of the record and our statement of facts shows that the 15 grain cars to be placed on the elevator track were west of the stock cars on the passing track which was north of the main line track running east and west through Rolla. When the 12 stock cars were coupled onto the 15 grain cars, the 27 cars were pulled out onto the main line track to the eastward. Hemphill, the rear brakeman, lined the switch after the train had cleared the switch on the main line track. He then gave a "kick-in" signal. The first kick-in signal, as we have seen, was not obeyed and a second trial was had which resulted successfully. The west end of the cars moving to the westward had to roll past Hemphill, the rear brakeman. Hemphill and Nolan were both operating on the south side of the train and next to the high bank on the south side of the main line. It would have been an easy matter for Hemphill to have gotten on to the rear car, and we strenuously contend that he should have done so for the purpose of riding the 15 grain cars on to the elevator switch. By so doing he would have complied with the rules of the company as hereinbefore referred to, and if he had done so, there can be no question but what Conductor Toops would have seen his lantern on the end of the car and his life would have been saved. The evidence established no custom abrogating

the rules. However, Hemphill waited for the entire cut of 15 grain cars to pass on beyond him and on to the elevator track, then turned the switch and gave a signal for the 12 stock cars next to the engine to be kicked over the cross-over track onto the passing track. That movement was successfully accomplished.

We wish to call the court's special attention to the fact that there was no necessity for kicking the 15 grain cars on to the elevator track. The safest plan to have pursued under the circumstances was for the engine to have pushed the whole train down the main line and on to the elevator track with Hemphill, the rear brakeman, on the west and moving end of same with his lantern. If this had been done Toops would have been warned of their approach and his life would have been saved; the grain cars would have been placed at the elevators for loading, and the 12 stock cars cut off from them and taken by Nolan and Hemphill back down the main line track and from thence over the cross-over switch on to the passing track. The last method would have taken but little more time than the movement of the cars on the kick-in signal and would have been in full compliance with the rules. In this connection we call the court's attention to the testimony of Mr. Nolan, the head brakeman (R. 22) as follows:

> "The first thing we did was to take the engine and the four cars which we picked up at Wilburton and went in on the elevator track and got five loads of grain which were billed out, and came back to the main track, and Conductor Toops made the coupling. The next thing that was done was to cut off the engine and went east on the main line to the east end of the stock track."

If it was the custom of the two brakemen to kick in cars in order to save time, when the five loads of grain and the four cars in front of them, making nine cars in all, were brought back on the main line track to be attached to the train standing on the main line, they would have been kicked in; but instead of that they were pushed in with the engine and the coupling made by Conductor Toops. This movement was done in accordance with the rules. There was no evidence introduced showing that the "kick-in" was used by this crew at any station from Dodge City to Elkhart or from Elkhart through Wilburton to Rolla; and no evidence whatever, as we have heretofore observed, showed that Conductor Toops had any knowledge of such a custom in violation of the rules.

However, inasmuch as the 15 grain cars were kicked in on to the elevator track, it was the duty of the rear brakeman, Hemphill, to have gotten on to the west end of the leading car and ridden them in and on to the elevator track. He was in a position to do that when the kick-in was made and knew the rules required it. When the leading car was passing him he should have swung on to the ladder on the south side of the west end thereof and climbed to the top of the car and taken his position at the brake on the west end thereof, where he could have warned Conductor Toops, by means of his white light, of their approach. It goes without saying that if he had complied with the rules he would have been in position to have applied the brake when he saw Toops was in danger, and have prevented the accident. In this connection we call

attention to the following excerpt from the opinion of Mr. Justice Burch (R. 107):

> "Conductor Toops knew perfectly well that no brakeman with a light would be on the end grain car to show him the string of cars was coming, because he planned the work so his brakemen would of necessity be otherwise employed, and in planning the work he was the company."

This statement has no evidence whatever to support it. There is not a scintilla of evidence to show that Conductor Toops had any knowledge that the rules applying to switching at stations would be violated, or of any custom abrogating the rules. There was no such custom. There was an attempt on the part of petitioner to establish such a custom, but it failed. Engineer Hall testified in substance that it was the usual practice for the engineer to give a kick-in signal when he is starting up a train on a kick-in signal (R. 42); and J. B. Robinson, an employee of the petitioner, testified in substance (R. 82) that it was not the custom to back cars in where you can't see the end, without somebody to protect whoever might be on the track, whether there is a roadway there or not.

As to whether or not there was a custom was a question of fact for the jury, and the jury resolved it in favor of the respondent. No doubt Mr. Justice Burch overlooked this evidence when he wrote his dissenting opinion. If Hemphill had mounted the leading car of the 15 grain cars when they were kicked in on to the elevator track, the engine and 12 stock cars could have remained on the main line track until Hemphill returned and turned the switch connecting the main line

with the cross-over switch, and they could have been moved on to the passing track. It would not have taken more than 5 minutes for Hemphill to have made the return after he had ridden the grain cars to where they stopped on the elevator track. A car is approximately 42 feet long including the coupler (R. 29). The string of 15 grain cars, therefore, would have been 630 feet long. Under Army regulations, soldiers walk in common time at the rate of 128 steps to the minute, 28 inches to the step; and at that rate 2.71 minutes only would have been required for Hemphill to return to the cross-over switch on the main line—not very much additional time to have completed the work without accident. The fact is, the switching operations, after Hemphill and Toops were talking to each other before the 15 grain cars were moved off of the passing track to be switched in on to the elevator track, consumed not to exceed 15 minutes of time, as Mr. Hemphill testified (R. 40). He said:

> "It couldn't have been over fifteen minutes at the very outside. It couldn't have been over ten or fifteen minutes from the time I was talking to him until he was found under the car."

From this it would seem that Mr. Justice Burch overlooked the fact, in writing his dissenting opinion, that the time consumed in such switching operations in accordance with the rules, means a reasonable time; and also overlooked Rule 381 (R. 83) which reads:

> "Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the

road *and not merely to make time over it.* Trains, however, are expected to run with regularity and as nearly on time *as the prompt performance of work and rules will permit*" (our italics).

It follows that if Hemphill had ridden the grain cars to the point where they stopped and had gone back to the cross-over switch, the time consumed would still have been a reasonable time upon a fair construction of the rule above quoted.

Here we wish to say that there is no rule authorizing kick-in or flying switches at stations. Rule 102 (R. 51) reads as follows:

> "When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicious position on the front of the leading car and signal the engineman in case of need."

This rule applies specifically to what we have just said. In this connection we desire also to call the court's attention to Rule 24, which reads as follows (R. 51):

> "When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

We also wish to emphasize Rule 473 (R. 51) which reads:

> "They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14."

The evidence without contradiction showed that each one of the rules just quoted were violated by the

switching crew. We have seen from the evidence that Mr. Hall, the engineer, did not ring the bell or blow the whistle. Mr. Hall also testified (R. 42):

> *"I could not see a brakeman on the rear end of the cars* or down near the middle of that string of fifteen cars. From the engine cab I could not see anyone standing on the ground. There was an obstruction there in a bank, probably five or six feet high. I didn't see any lantern thrown out of any kind, I couldn't have seen it. It was a clear night, but dark. I knew Toops very well. His disposition was cheerful."

And on cross examination he said (R. 42):

> "I could not see the movement of the cars. I could see the lantern. If I had had a lantern I could have seen the movement of the cars possibly a short distance. I suppose you could see with a lantern when you were coming to a track."

Mr. Hall further said (R. 43):

> "There was a curve there that made it impossible to see around to the back end of the fifteen cars."

None of the above quoted rules were observed. From what we have said it will appear to the court that the conditions were such at Rolla station, with the curve in the track, the high bank, and it being impossible for the engineer as well as the two brakemen to see the end of the cars, that it was all the more necessary for these rules to be strictly complied with, especially as the night was dark and the cars could not be seen. The rules introduced in evidence in this case as well as the definitions of "station" and "yard" (R. 28) clearly defined the duties of the

switchmen and the engineer. These rules without a doubt were carefully compiled by the operating department of the Santa Fe Railway System, and it is a well known fact that such rules were adopted by the petitioner in order to reduce accidents on its line to a minimum. The slogan of "Safety First" is stressed by the Safety First Department of the entire Santa Fe System in accordance with Rule 483 (R. 84) which reads:

> "They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, *and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety.* When it becomes necessary to protect rear of train enginemen will promptly signal flagman as per Rule 14 (c)" (our italics).

This rule speaks for itself—it is an instruction —and the advice given therein by the operating department was entirely ignored with the result that Conductor Toops was killed.

There Was Ample Evidence to Warrant the Trial Court in Overruling the Petitioner's Demurrer to the Evidence and in Submitting the Case to the Jury; and That Being True, the Supreme Court Was Justified in Affirming the Judgment of the Lower Court.

The petitioner sought to overcome the force and effect of the respondent's testimony by endeavoring to establish a custom on the part of trainmen to do their work in the manner in which the work was done as

shown by the evidence in this case. However, upon this point there was a conflict of evidence, and even if we admit for the purposes of this argument that there was some evidence showing a custom which warranted the violation of the rules hereinbefore quoted, the jury decided that conflict of the evidence against the petitioner and in favor of the respondent. We quote from the evidence upon this crucial point as follows (R. 42):

Engineer Hall, among other things testified as follows:

> "It is usual for the engineer to give a signal when he is starting up a train on a kick signal."

This language is direct, specific and positive and annihilates petitioner's theory that it was not the custom to blow the whistle when a kick-in is to be made. Again Engineer Hall testified (R. 43):

> "There was a curve there that made it impossible to see around to the back end of the fifteen cars."

The evidence was undisputed that the whistle was not blown nor a signal of the kick-in made. The lantern signal given by Hemphill to the head brakeman and the engineer for the kick-in could not be seen by Mr. Toops at the derail where he was killed. Mr. Nolan, the head brakeman, testified upon this point as follows (R. 24):

> "There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely by his lamp signals that I was working by, and I was unable to see Mr.

Toops on account of the curve there and the cars pointing on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that 'L' and curve that is there. If he had been beyond that I couldn't have seen him from where I was working. Mr. Hemphill's kick-in signal could not have been seen from the derail to where Mr. Hemphill was standing. *The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from.* There was no whistle given, and I don't believe the bell was rung" (our italics).

J. B. Robinson, one of the petitioner's witnesses, testified that it was not the custom to back cars in where you couldn't see the end, without somebody to protect whoever might be on the track. The following question was asked him, and answer given (R. 82):

"Q. It isn't the custom to back cars in where you can't see the end, without somebody to protect whoever might be on the track, whether there is a roadway there or not, is it?
A. No, sir; it isn't."

From the foregoing it will be seen that it was not the custom to kick cars in without the engineer giving the signal of a kick-in by whistle, nor was it the custom for the trainmen to back cars in where they could not see the end of the cars, without having a brakeman on the end thereof with a lighted lantern. Hence, we find that the argument of the petitioner that it was the custom to violate the rules, utterly fails.

No Eye Witness Saw Conductor Toops Killed, But There Are Several Physical Facts Which Show Conclusively How He Met His Death.

His body was found between the rails of the elevator track at the derail. His shoulders were upon, and jammed against, the derail, his body lying diagonally across the track between the rails, with his feet to the north and east toward the north rail.

His head and right arm were mashed off, and with his hat were lying south of the south rail of the elevator track near the derail.

His lantern and lead pencil were lying near together, south of the elevator track about two or three feet away from the south rail of the track, his lead pencil lying between his lantern and the south rail.

His train book was found lying in the center of the track between the rails, about 3 feet east of his body. The surface of the track between the rails showed clearly that the body was dragged westward two or three feet until his shoulders were jammed against the derail.

Three or four cars passed over his body and were standing west of the derail where they stopped from lack of momentum.

Conductor Toops was last seen before his death at the east end of the station platform. He was looking over his train book. Mr. Hemphill, the rear brakeman, said that at that time he was holding his train book in his hand. As to this fact Hemphill testified (R. 35):

> "As I rode by him that was the last time I saw him on the platform. I could see the bill book and he had it in his hand. He was leaning over it with his elbows on the truck."

Of course, no one saw Mr. Toops leave the end of the platform and go to the place where he was killed, but it is safe to say that he followed the path along the south side of the main line track and went until he was approximately opposite the derail, and then passed over to the elevator track to the point where he was killed. The track at the point where Toops was killed was skeletonized; that is, there was no ballast there and but very little dirt between the ties, as shown by the testimony (R. 50); and also that thistles and weeds had grown up between the ties; that Toops saw this track for the first time in 13 years. It goes without saying that as he approached the track and started to cross the same, he directed his attention to these ties in an endeavor to pass over the track without stepping between the ties or falling; that the attention he was required to give to his passage over the track, may have in part prevented him from seeing the unlighted and unprotected grain cars that were approaching him from the east until they were right on him. It was not easy to see moving objects by the light of a lantern on that night. Mr. Nolan testified relative to Conductor Toops' movement on that dark night as follows (R. 25):

> "I noticed him a couple of times while the couplings were being made, and I noticed two lanterns down there. I wouldn't have known one from another any more than watching the lanterns and knowing who came out at the rear end of the cut. It was a dark night. I couldn't see any surrounding objects where Mr. Toops and Mr. Hemphill were with their lanterns. I couldn't tell which was which. It was too dark."

This shows conclusively that unlighted objects a short distance away from the lantern were not visible to the naked eye, and if Hemphill, the rear brakeman, had been on the rear of the moving car with his lighted lantern, Toops could have seen it approaching the spot where he intended to cross the track and have guarded himself against the danger. Therefore, the finding of the jury that Toops could not see the approaching unlighted cars, was fully sustained by the evidence.

We contend that the only reasonable hypothesis that can be drawn from the established and undisputed physical facts is that Conductor Toops was struck by the west end of the moving cars; that when his left side was struck he dropped his train book, and his lantern and lead pencil were thrown south of the track. It would be but natural for the lantern and pencil, both having been without doubt in his right hand, to be thrown beyond the track inasmuch as the pencil fell between the lantern and the south rail of the track. Hemphill testified (R. 40): "I think Mr. Toops was righthanded." The fact that the body was dragged for a distance of two or three feet and the shoulders were jammed against the derail, shows conclusively that the first car in passing over his body dragged it into such a position as to throw his head and right arm over the south rail in such a manner as to cause the wheels to sever them from his body and at the same time to knock off his hat, which was found lying between the lantern and the pencil and the south side of the south rail. Whether or not there was blood on

the first car is of no consequence and can be accounted for by the testimony of Dr. Duvall alone, who testified (R. 56):

> "I am a practicing physician. Have been for thirty-one years. In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

This evidence was not contradicted. We contend that these actual physical facts show with certainty that Conductor Toops was struck by the west end of the first car, knocked down and killed, and that no other reasonable hypothesis can be drawn from the evidence.

The fact that the track at the point where Conductor Toops was killed was skeletonized, as we have seen, and that its condition required greater care on the part of Conductor Toops in passing over the same than otherwise would have been required, coupled with the fact that it was difficult to see the outline of objects only a few feet away by lantern light, warranted the jury in making finding No. 10 which reads as follows (R. 82):

> "Q. No. 10. State fully in what the negligence of the defendant consisted, if any.
> A. No. 10. 1st, in not protecting rear end of 15 grain cars. 2nd, in engineer not sounding signal when starting to back cars around curve and through cut. 3rd, poor condition of track at derail switch."

Right here we wish to make this observation: That it is a matter of common knowledge that one who

is carrying a lantern on a dark night, when he looks up and around, can only see a very few feet away. Hence the reason for Rule 24 (R. 83) which reads as follows:

> "When cars are pushed by an engine (except when shifting or making up trains in yards), *a white light must be displayed on the front of the leading car by night*" (our italics).

If this rule had been complied with, Conductor Toops could have seen the white light on the end of the grain cars approaching him in time for him to have protected himself. This cannot be controverted.

The petitioner has attempted to elucidate a different theory as to how Toops met his death. On pages 17 and 18 of their brief, it is said:

> "The Supreme Court of Kansas, in the opinion written by Justice Hopkins, indicates that he could not have been attempting to get onto the cars because if he had been so doing his body would not have been found between the rails but would have been on the side of the track. This shows entire unfamiliarity with the structure and arrangement of the ladders on box cars. On every box car there is a ladder at each end on the side of the car, and in addition to these ladders on the side of the car there are also ladders on the end of the car, right around the corner from the side ladders, and it might very readily be that Toops caught onto the side ladder and swung around to the ladder on the end for the purpose of reaching the top of the car; and this would thoroughly explain how it was that he may have fallen and his body might have been found between the rails. *Of course, this is pure surmise, but it does not seem so improbable as the ex-*

planation given by the jury and approved by the trial court, and afterwards by the Supreme Court of Kansas" (our italics).

We wish to say that the illustration fails of its purpose and does not suggest a theory of the death that can be accepted as plausible in this case for the following reasons:

If Conductor Toops had met his death in the manner described by the petitioner, his train book would have been in his coat pocket, his lead pencil would have been in his vest pocket, and it would have been necessary for him to have carried his lantern on one arm; that is, with his arm thrust through the handle of the lantern which is made especially for that purpose so that trainmen can use both arms to swing onto a box car and climb to the top thereof. If Conductor Toops had gotten onto the ladder on the west end of the first car or the ladder upon the west end of the second car, *he could not have done so with his train book in one hand and his lantern and lead pencil in the other.* He would have had to have both hands free in order to get on the ladder on the side of the car, and certainly would have had to have both hands free in swinging from that ladder around the end of the car onto the ladder on the end of the car for the purpose of reaching the top of the car, as suggested by the petitioner in the foregoing quotation. Their theory is absolutely untenable. It follows that the physical facts established by the evidence without any contradiction, show conclusively and unerringly that Conductor Toops met his death by being struck

by the west end of the first car as found by the jury.

Petitioner complains at length that the distinction which Mr. Justice Hopkins drew between "stations" and railroad "yards" is untenable, and endeavors by its argument to convince the court that there is no difference. We wish to remark that it would be very difficult for counsel for the petitioner to convince the operating department of the petitioner that there is no distinction between stations and yards. The operating department intended there should be a distinction. Hence the reason for the adoption of the two definitions. It is plain to anyone not in the railroad service that there is a distinction. "Yard" is defined by the rules of the petitioner as follows (R. 28):

> "Yard—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

If we apply our common knowledge to the interpretation of this rule, we know at once that the movements of engines and cars in yards in the making up of trains are made without any authorized time-table. A yard contains many different tracks and those tracks and are not only used for storage but for the switching about and making up of trains and the segregation of empty cars from loaded cars in transit. Such yards are usually constructed so that there is a slope from one end of the yards to the other in order that cars may be moved by gravity. It is a well known fact

that the yards established by the Santa Fe Railroad system are busy places and have more than one engine operating therein. In many cases several engines and switching crews are employed, and they are constantly moving cars backwards and forwards. It is patent that the ringing of bells and the blowing of whistles would tend to confuse as was held in *Arkfetz* v. *Humphrey,* 145 U. S. 418, quoted in *Toledo St. Louis & Western R. Co.* v. *Allen,* 276 U. S. 165 (Petitioner's Brief, 32). However, at a small station like Rolla where there was only one engine operating, there could have been no confusion. A "kick-in" whistle signal would have warned Conductor Toops that the 15 grain cars were being kicked in onto the elevator switch.

"Station" is defined as follows (R. 28):

> "Station—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."

When this definition is compared with the definition of "yard," it will be seen at once that a station is a place *on the time-table* where a train may stop for traffic. It is a part of the railroad system through which movements are authorized and defined by time-table or by train order, and differs materially from yards where the movements of trains and cars are made when not authorized by time-table. The distinction is very clear and the operating department knew what it was about when it formulated the two definitions.

From what we have said it follows that the authorities cited by the petitioner in its brief from pages 29 to 37, are not in point. They do not apply in any sense to switching movements at stations but analyze cases where injuries were inflicted in the movement of cars and trains in *yards.*

The petitioner on page 27 of its brief, referred to the case of *C. M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, and among other things said:

> "The Coogan case is the one particular case upon which petitioner relied in the trial of this case before the jury and also in its contention before the Supreme Court of Kansas. In that case at the close of the evidence the petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of the petitioner, and that any verdict for respondent would be based upon speculation and conjecture, and in the decision this contention on the part of the petitioner was sustained."

A reading of this case shows that it is not an analogous case to the one at bar. There was only one act of negligence alleged and that act of negligence was not sufficiently proven. Consequently, the case was erroneously submitted to the jury. The evidence introduced still left the manner of death a speculation and conjecture. There were no physical facts or circumstances sufficient to sustain the verdict. However, in the case at bar, as we have seen from the foregoing argument, there was ample evidence upon

every point at issue, not only to show the negligence of the petitioner but a number of physical facts which showed unerringly how Conductor Toops met his death.

It will be noticed that the petitioner has quoted quite extensively from the Allen case, *supra*. The employee injured in the Allen case was a car checker and worked at regular hours in the yards; and the case is not analogous to the one at bar. We have studied this case carefully and it is easily distinguished from the instant case in many of its important phases. *First*, in the Allen case the accident happened in a busy yard, while in the instant case the accident happened at a way station. *Second*, Allen was a car checker and had been employed for about 18 months immediately previous to the accident, while here Toops had not been over these tracks for many years and had not worked on a freight crew for 4 or 5 years. *Third*, the court said in the Allen case (p. 171):

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard."

In our case there is a complete lack of evidence that Toops was acquainted with any custom of "kicking" cars. The evidence that there was any such custom, was disputed, and certainly it remained for the jury to weigh the evidence. *Fourth*, the court said in the Allen case on page 171:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the

space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

While in the instant case Conductor Toops was not familiar with the track where he was killed; he saw it by the light of his lantern for the first time in 13 years, immediately before he was killed. He did not know that his train crew would violate the rules. He had a right to believe and rely upon the rule requiring the engineer to give two blasts of the whistle as a kick-in signal when he started to kick in cars; and he had a right to rely upon the rule requiring a brakeman to take his position on the moving end of the kicked in cars, with a white light. He had a right to rely upon the rule that a white light would be on the end of the moving cars. He had a right to rely upon the fact that where there is a curve in the track and a high bank on the south side thereof, none of these rules would be violated, and that the moving end of the cars would be protected. Therefore, he could not be charged with knowledge that these violations of the rules would be made, and he assumed no such risks.

Fifth, in the Allen case, Allen was a car checker and not a member of the crew. In this case Toops was the conductor. The members of the crew are charged with a knowledge of the provisions in the rules, and that kicked-in cars at stations must be protected by a man or by a light. They knew they were strangers to Toops; they knew that he had to cross the elevator

tracks and that it was a place of danger; that it was his duty to inspect the derailer under rule No. 471 (R. 84), which reads as follows:

"They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of *derailing switches* and know they are right before attempting to pass them."

As we have seen, no custom of kicking cars was proven and there is not a scintilla of evidence that Toops had ever heard of such a custom. So this crew knew that Toops was in a place of danger, or, in the exercise of any care at all, they should have known he was in peril. Neither the engineer nor the two brakemen could see Conductor Toops as he approached the track near the derailing switch on account of the curve in the elevator track and the high bank, as we have seen from the evidence. The train crew knew that he was not on top of the 15 cars because if he had at any time succeeded in getting on top of the 15 cars, his lantern would have been seen, as testified to by Hemphill (R. 38) who said:

"You could see anyone with a lighted lantern on top of any of those 15 cars."

This is additional evidence that Toops was never at any time on top of the 15 cars and therefore could not have fallen off of them onto the track.

It will be noted that the dissenting opinion was written by one justice. Two others dissented to the opinion of affirmance but they did concur in the dissenting opinion. Mr. Justice Burch labored under the

impression that because there were no eye witnesses the respondent could not recover because no one knew exactly how his death occurred. In the light of the evidence this was an erroneous conclusion on the part of Justice Burch. The physical facts shown by the evidence explained precisely how Toops met his death, and exclude surmise and conjecture. Our position is supported by the reasoning in *Kelly* v. *Union Pac. Ry. Co.*, 141 N. Y. App. 490, 125 S. W. 818, wherein the court stated the proposition as follows (p. 820):

> "The evidence leaves a possibility of the deceased's death resulting from circumstances or causes for which defendant would not be liable. But we think it showed sufficient facts and developed sufficient circumstances which united gave ample ground for the jury to say with reasonable certainty that the proximate cause of the death was defendant's negligence in leaving the wheelbarrow where it was. And reasonable certainty is all that is required. A possibility of a cause for which defendant would not be liable is not enough to outweigh a probability of such nature and carrying such strength as to produce reasonable certainty in the minds of a jury. A mere possibility will not justify a jury in finding a defendant innocent in a criminal prosecution. The fact that the catastrophe which happened to deceased was unseen will no more cut out a right to show by circumstances the cause of its occurring than would the unseen commission of a crime prevent conviction on circumstantial evidence. So after due consideration of the suggestions made by defendant as to the sufficiency of the evidence, we have concluded it was ample to sustain the verdict, and hence find there was no error in refusing the demurrer."

Under the facts in this case the question of negligence was properly submitted to the jury. In *Willever* v. *Delaware, L. & W. R. R. Co.,* 89 N. J. L. 697, 99 Atl. 321 (1916) rev'g 87 N. J. L. 348, 94 Atl. 595 (1915) (19 N. C. C. A. 483n.), which is a similar case to the one before the court now, section 1 of the syllabus reads as follows:

> "Where as a part of its operating system, a common carrier by railroad in interstate commerce has provided and notified its employees of a rule that in the 'movement of trains' when 'cars are pushed by an engine' a man shall take a 'conspicuous position on the front end of the leading car to signal the engineman in case of need,' and an employee so notified of the rule, who, in the performance of his duties, has, in reliance upon the rule, placed himself 200 feet in front of a long train of empty freight cars not being 'drilled,' and standing on a track not used for 'drilling' purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train, and without warning pushed it over him without a man being placed on the front end of the leading car in accordance with the rule, the question of the negligence of the train crew, the common carrier's employees, was properly left to the jury, citing *D'Agostino* v. *Pennsylvania R. R. Co.,* 72 N. J. L. 358, 60 Atl. 1113, and *Germanus* v. *Lehigh Valley R. R. Co.,* 74 N. J. L. 662, 67 Atl. 79."

The rules as to the conduct of a train crew in switching trains in yards, in the Willever case, are similar to the rules set forth in this case. Quoting from the opinion in the Willever case, *supra*:

> "The Rule No. 102 quoted above was contained in a book of rules under the subheading

'Movement of Trains.' Some witnesses testified that this book of rules was for the operating of trains out on the main line only and was not intended to apply to yard work. The evidence also showed that the book of rules was given to employees whose duties were exclusively within the yards as well as to employees who worked or ran trains on the main lines. Willever was furnished by the company with a copy of this book of rules. There was nothing in the book of rules to indicate that Rule No. 102 had no application to 'movement of trains' within yard limits, nor was there any evidence that Willever had ever been told that it did not so apply within those limits. The language of the rule itself is, 'When cars are pushed by an engine,' and the subdivision under which it occurs is headed, 'Movement of Trains.' * * * Turning now to the second point relied upon by the supreme court, it is said that Willever having received instruction and knowledge, as a section foreman for five years, that he must look out for his own safety, the defendant company, under the doctrine of assumption of risk, as applied in the case of *Precodnick* v. *Lehigh Valley Railroad Company, supra*, was, as to him, under no duty to give warning. We do not think the negligence of defendant's employees in failing to comply with the rule established for Willever's safety was one of the dangers he undertook to look out for, and therefore one of the risks he assumed. Obviously Willever's undertaking to look out for his own safety is, to a certain extent, a relative assumption, and therefore prescribed by the limit of dangers incident to his employment under the system established for the operation of the business. This is necessarily so."

The rule book furnished the Santa Fe employees contains Rule 102 in the identical words as Rule 102 in the Willever case with the exception of the addi-

tion of the words in parenthesis "except when shifting or making up trains *in yards.*" We believe that the addition of those words in parenthesis emphasizes and brings more forceably to the attention of trainmen and crew that when switching or making up trains in yards, the crew with which they are operating will not look out for them, that they must look out for themselves in the shifting or kicking in of cars without warning signal; but that when they are on the road and at stations or when shifting cars on tracks which are not in the yards, then they must give warning, and that negligence to do so by a member of the crew is not such a risk as is assumed by the other members.

The rules show that Rolla, Kansas was a station and not a yard. The crew at the time of Toop's death was not making up a train but was setting cars in on the elevator track for use by the elevators, and Rule 102 was in full force and effect.

In the case of *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 134 C. C. A. 37, 218 Fed. 23, the court had before it a case very similar to the one here. Proffitt, a brakeman, was injured when a collision took place caused by the yard crew who negligently and with undue violence (as the jury doubtlessly found) drove a cut of 29 cars into the standing cars upon which the plaintiff was working. There was some conflicting testimony as to whether or not any signal had been given and as to whether or not anyone was on the cars kicked in against the cars upon which Proffitt was working. In the opinion, page 465, the

court said in affirming the judgment of the circuit court of appeals:

> "Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that 'it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling.' Two of the defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by the plaintiff; the other declaring that 'all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given.' While another and experienced witness, called by the defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: 'Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car.' Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on a manifest train. He testified that he had been employed as a brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was 'pulled off the local freight.'
>
> "Plaintiff recovered a verdict for substantial damages, and the judgment was affirmed by the

circuit court of appeals (132 C. C. A. 37, 218 Fed. 23)."

In this case the petitioner has virtually admitted and does admit that the rules provided by the company were violated by the switch crew (the evidence shows this conclusively); that there was no man on the rear of the switched cars; that there was no light on the rear of the switched cars; and they admit that no warning, either by whistle or bell, was given by the train crew of the kicking in of the cars, and that the track was defective at the place of the accident.

Their petition for writ of certiorari is based upon the hypothesis that, granting all those acts of negligence, still there is no evidence that the death of Toops was caused by such acts of negligence. In other words, that they were not the proximate cause. It is our contention that whether or not they were the proximate cause of Toops' death were questions for the jury, quite properly submitted to the jury and having been so found by the jury, are conclusive. *Donegan* v. *Baltimore, etc., R. Co.*, (N. Y. 1908) 165 F. 869, 91 C. C. A. 555; *Erie R. Co.* v. *Schleenbaker*, 257 F. 667, 40 Sup. Ct. 13, 250 U. S. 666, 63 L. Ed. 1197; *Southern Pac. Co.* v. *Thomas*, 188 Pac. 268, 41 Sup. Ct. 447, 255 U. S. 576, 65 L. Ed. 793; *Davis* v. *Wolfe*, 44 Sup. Ct. 64, 263 U. S. 239, 241 S. W. 915, 294 Mo. 170; *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118.

This last cited case, *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118, is similar to this case in many

of its facts. It will be sufficient to quote a small part of it beginning on page 120:

> "It was claimed on the trial, and insisted, and the court submitted the question to the jury, that the defendant was negligent in backing this train on the passenger track, under the circumstances and in view of the surroundings and conditions, without having a light either on the side of the rear car nearest Hughes, or a man there with a light, and the jury found that it was negligence to move that train on the passenger track backward towards the switchman's shanty under the circumstances and surrounding conditions without such precaution, which was perfectly feasible. There was some evidence that this had been done on other occasions, one at least; but it is apparent to any intelligent man that a light could have been attached to one side of the rear end of this moving train—that is, the end nearest Hughes—or that a man taking hold of the grabiron and with his foot in the stirrup and holding a lantern could have seen the track for some little distance in front of the moving train as it proceeded towards the shanty. I think the case was properly submitted to the jury, and that the evidence presented a question of fact for the jury to determine, and that the verdict should not be disturbed.
>
> "*Southern Railway Co.* v. *Smith*, (C. C. A. 6th Circuit) 205 Fed. 360, 123 C. C. A. 488, is a case closely in point. It is there held:
>
> > 'While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who may neglect to protect himself, and the extent

of such duty is measured by the peculiar circumstances of the case.

'While plaintiff's intestate, who was a switchman in defendant's railroad yards, was walking along a track in the yards at night, he was overtaken and killed by an engine which was "drifting" or moving slowly behind him on the track, making very little noise. Its headlight was dim, and rendered more so by the electric yard lights, and there was a train passing on an adjoining track, which covered what noise the engine made. It could have been stopped within 10 feet, but the engineer did not see deceased. Held, that the facts tended to show that the engineer was negligent, and his negligence had a causal relation to the injury, and that a verdict for plaintiff was supported by the evidence.'

* * * * *

"The jury well may have found that to move these cars by backing down on the passenger track, under such conditions and surroundings, in the darkness, with no light at all at that end of the train, and only a man with a lantern on top of the car, was negligence. It was, of course, the duty of the defendant and of those moving these cars to keep such lookout as was reasonably necessary to avoid doing injury to an employee who under the circumstances might have neglected to fully protect and care for himself. The extent of the duty depended on the circumstances of the case, and the question was in my judgment one for the jury to determine."

If by any stretch of the imagination the petitioner could persuade this court that Rolla was a yard and not a station, then it would still have to contend with the undisputed fact that Conductor Toops was an utter stranger both to the tracks at Rolla, Kansas, to the

crew, and to their method of conducting switching operations. Mr. Toops had been in the employ of the Santa Fe for a good many years but had not been over this branch line for 13 years. He had been employed in the passenger service for the four or five years immediately preceding the accident. He had never seen either of the brakemen and was but slightly acquainted with the engineer and the fireman. There was some testimony of a custom of kicking cars without warning, but there was also the testimony of the engineer, Robinson (R. 82), that "it was not the custom to back cars where you could not see the end, without somebody to protect whoever might be on the track, whether there is a roadway or not"; and Engineer Hall testified (R. 42), "It is usual for the engineer to give a signal when he is starting up a train on a kick signal." So it would still be a question for the jury as to whether or not there was such a custom. In addition to that there is the silence of the entire record as to whether or not Toops knew of such a custom; and if he did not know of such a custom, then he could not be charged with negligence for not observing it. No one told him about such a custom; in fact, there was no such custom proven. Toops did not assume the risks of the defective track nor the negligent operation of the train.

39 C. J. 692, Paragraph 986, states the substantive law on the assumption of risk. It is as follows:

> "Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence, under the general

rule as to extraordinary risks, but subject to the limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and to agree by implication of law not to subject a servant employed by him to extraordinary or unusual perils, and the servant has the right to assume that the master will perform his duty in this respect, except to the extent that the rule may be modified as to risks that are so open and obvious that a man of ordinary prudence would see and appreciate them; and it is very generally declared that the risk assumed commences only after the master has exercised due care in the performance of the duties which the law casts upon him."

18 R. C. L., Master and Servant, paragraphs 167 and 168, reads as follows:

"Risks 'Assumed'; 'Ordinary' Perils of Employment—The dangers in respect of which there can be no recovery for injuries by virtue of the doctrine of assumption of risk include but according to the generally accepted statement do not extend beyond the 'ordinary' risks of the employment or such as are 'incident' thereto. And the 'ordinary' risks incident to the service are those perils of which employees have notice or which are patent and obvious to them. To risks which arise after the commencement of employment, as well as to those contemplated when the service began, the doctrine of assumption of risk applies, but a change of appliances of which an employee has no knowledge or notice is not a risk which he assumed.

"Employer's Negligence as Included among Risks 'Assumed.'—A topic that has given rise to much comment and not a little confusion is whether the employee 'assumes the risk of the employer's negligence.' A note of indefiniteness is noticeable in many of the expressions, and some statements are quite unintelligible. It is generally asserted without qualification that the employee does not assume the risk of the employer's negligence, but just what conception is embodied by this expression is not directly explained. It is reasonably certain, however, that what is meant is that the employee is not barred of recovery for injuries due to perils of which he has no knowledge and appreciation. It must be constantly borne in mind that liability is to be determined with a view to the comparative knowledge of the parties. Primarily the employer is bound to provide for the safety of his employees, and the employees have a right to rely upon the performance of this duty. They are not barred of recovery for injuries—or in the terminology of the present topic they do not 'assume the risk'—occasioned by the failure of the employer to perform his primary duty, unless they have actual or constructive knowledge of the dereliction and of the perils arising therefrom, and continue in the employment without protest or complaint. The principle, it will be noted, is that of contributory negligence. So the employee does assume the risk of the employer's negligence when the fact of such negligence is known and the danger therefrom appreciated by him. Under the rule of the common law the employer virtually may conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knows the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he 'assumes the risks' of the more dangerous method. Accordingly, if the employer furnishes his employee with a tool, apparatus or machine that

is not reasonably safe, and the employee proceeds with the work with the full knowledge of the defect and danger, there can be no recovery in case of a resulting injury; for, it is said, the employee 'assumed the risk.' Again, if the employee consents to occupy the place assigned him in which to work, and to incur all the dangers incident thereto, having sufficient intelligence and experience to enable him to comprehend such dangers, his assent dispenses with the performance of the employer's duty to furnish him with a safe place in which to work."

The case of *C. R. I. & P. R. R. Co.* v. *Ward*, 252 U. S. 18, is a case very much in point here. In that case Ward, a switchman, was thrown from the top of a box car upon which he was about to apply the brake. There was no question of the insufficiency of the equipment. The only question was the contributory negligence of his fellow servants and assumption of risk. The court said on page 21:

"As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 315, 60 L. ed. 1016, 1020, 36 Sup. Ct. Rep. 564: 'According to our decisions, *the settled rule is not that it is the duty of an employee* to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, *but that the employee may assume that the employer or his agents have exercised proper care* with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Em-

ployers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 468, 50 L. ed. 1102, 1106, 36 Sup. Ct. Rep. 620; *Erie R. Co.* v. *Purucker*, 244 U. S. 320, 61 L. ed. 1166, 37 Sup. Ct. Rep. 629.

"Applying the principles settled by these decisions to the facts in this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assumed the risk" (our italics).

Another case in which both the question of assumption of risk and defective appliances were at issue, is that of *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94. In that case Hall recovered judgment for injuries sustained by him in the wreck of a three-wheeled gasoline velocipede which had a defective wheel. On page 100 of the decision the supreme court indulges in some presumptions and inferences which are infinitely more far-fetched than would be any presumption or inference in the instant case. On the question of the assumption of risk, the court said, page 101:

> "'The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.' This, we think, was a correct instruction under the circumstances of the case. An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence unless the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is pre-

sumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. *Union P. R. Co.* v. *O'Brien,* 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co.* v. *Archibald,* 170 U. S. 665, 671, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777; *Choctaw, O. & G. R. Co.* v. *McDade,* 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; *Texas & P. R. Co.* v. *Swearinger,* 196 U. S. 51, 62, 49 L. ed. 382, 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; *Burns* v. *Delaware & A. Teleg. & Teleph. Co.,* 70 N. J. L. 745, 752, 67 L. R. A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673."

The case of *Illinois Cent. R. Co.* v. *Norris,* 245 Fed. Rep. 926, is a case which arose in the State of Illinois and was taken on error to the District Court of the United States for the Eastern District of Illinois. Norris was killed while in the act of coupling up two cars. The engineer testified that he received the signal to back up; that shortly before he received the signal, he saw on the same side of the train, two lanterns, one of which he believed was carried by the brakeman, and one by the conductor. The conductor testified that he did not know where Norris was nor did he see him or his lantern shortly before he gave the signal to back up; that he did not know nor was it his duty to find out Norris' exact position before giving the signal to back up.

We quote now from the court's opinion on page 929:

"Defendant further contends that the evidence, viewed most favorably to the plaintiff, fails

to support a verdict against it, and that the motion to direct the verdict for the defendant should have been granted. The alleged negligence of the defendant was based upon the action of the conductor in directing the engineer to back up the train when Norris was between the cars and subject to be injured by any sudden and unexpected movement of the cars. It appears from the testimony of the engineer that, immediately before receiving this signal to back up, he looked out of the cab window and saw upon the same side of the train, lights from two different lanterns, and it is well nigh impossible to conclude that these two lanterns were held by any one other than the conductor and the brakeman, Norris. It is therefore contended by the plaintiff, that the brakeman being between the conductor and the engineer shortly before the signal to back was given and he having disappeared at the time the signal was given, the conductor was negligent in directing a movement of the train which was necessarily fraught with such danger to the life of the brakeman.

"Defendant contends that, notwithstanding this evidence, it was free from neglect, because of the testimony of the conductor to the effect that he did not see the brakeman and that, it was not his duty to locate him before giving the signal. We cannot accept the defendant's contention, notwithstanding the conductor's statement that each employee looked out for himself, and that it was not customary for a conductor to ascertain where his men were before he gave a signal. We are convinced that the evidence warranted the jury in finding the conductor negligent upon the facts disclosed by the testimony in this case. The testimony justified the jury in finding that the conductor had good reason to believe the brakeman was between the cars. It was the brakeman's duty to go between the cars and release angle cocks and shut off the air in switching cars.

"Where the brakes are operated by air, it is necessary for the brakeman or conductor to 'cut the line' as well as to uncouple the cars. Norris had been constantly so engaged to the knowledge of the conductor. He was supplied with a lantern. Both men were busily engaged in a common task, and were only a short distance apart. If Norris' lantern was not in sight, the conductor had good reasons to believe that he was between the cars. The conductor, on cross examination, admitted that it was the duty of each of them (the conductor and the brakeman) 'to look out for each other as much as possible.' We conclude that the jury was amply justified from all the evidence in finding the conductor guilty of negligence in the respect claimed by the plaintiff.

"Nor did the deceased assume the risk of such signal being carelessly given. We may well accept the statement that each employee in switching operations, was to look out for himself, and yet a brakeman could not be said to have assumed the risk arising from the negligent conduct of the conductor. The brakeman was not chargeable with notice that his fellow employee would violate a rule or a custom. He had reason to believe the conductor would not move the train while he was between the cars. If, as the conductor said, it was his duty to look out for the brakeman as much as possible, the brakeman had a right to assume that such duty would not be violated. *We conclude no error was committed in submitting both the questions of the defendant's negligence and the deceased's assumption of risk to the jury*" (our italics).

You will note the circumstances in the above quotation in the third paragraph where the conductor on cross examination said it was the duty of trainmen "to look out for each other as much as possible." In this case we do not have the direct evidence that it

was their duty to look out for each other as much as possible, but we do have the evidence of Mr. Nolan that he had been trying to locate Mr. Toops' lantern (R. 26), and also the evidence of Mr. Hemphill that when the engineer stopped he thought it was because they had gotten out of sight and the engineer had stopped for a signal, and he gave him a back up signal before he discovered that something had happened (R. 37). So we believe that we are safe in saying that it is the duty of members of a railroad crew to look out for each other as much as possible. That is common sense. Surely railroad men must work together. They are none of them a law unto themselves. The engineer must back on signal and the signal must come from the brakeman. Surely one brakeman doesn't just decide that they are going to back up and give the signal. They must work together. In this case they didn't work with Mr. Toops. They forgot all about him. They knew what his duties were—that he should cross the track and assist in the switching. He had a bright lantern, easily visible. There was nothing on earth but the cars upon which they were working to obstruct the view of his lantern, and if they didn't see his lantern they should have known he was in a place of danger and should not have given the back up signal without knowing where he was or without giving some warning signal that they were about to back the cars without anyone on them and without a light being on them. Surely he was entitled to that whether the track was good or not and whether he was a stranger to this territory or not, and the fact that the track was defective and negligently constructed,

and so found by the jury, and the fact that he had not been down there for fifteen yars, that he didn't know the location of the tracks other than approximately, that he did not know the switch crew nor their method of switching and that there were no switch lights, was all the more reason why they should have fulfilled to the letter the rules and regulations prescribed by the company, or have given him some warning or have instructed him as to the custom of this crew.

The case of *Central R. Co. of New Jersey* v. *Colasurdo,* 192 Fed. Rep. 901, was another case in which the injury was occasioned by the kicking in without warning of unlighted cars. Two people were injured in this accident, one was killed and Colasurdo lost his leg and filed this action. The plaintiff and two others were repairing a switch in the Jersey City yard. Shortly before the accident occurred a train of four cars arrived at the station and after discharging its passengers the four cars were kicked back to the station platform for reloading. They had no motive power and were controlled only by their own brakes. Quoting now from this case on page 902:

> "There was testimony from which the jury may have found that this train was not lighted and was running at the rate of ten miles an hour in charge of a single brakeman, that no signal or warning of its approach was given and that the brakes were not applied until the train was but six or eight feet distant. There can be no question that the three men, all of them experienced railroad men, were taken by surprise. Nighland was killed, the plaintiff lost his leg and Saldero escaped. If the testimony of the witness Gallagher be true, it

seems incredible that some one of the three did not hear his shouts and whistles or see the lights on the platform of the advancing car. The fact that two of the men were run down is persuasive testimony that the car approached them silently and unseen.

"We cannot believe that the risk of being injured in this manner while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant.

"We have no doubt, if the federal liability act is applicable, that a cause of action was established, for under it contributory negligence is no defense and the defendant is liable for the negligence of its employees Nighland and Gallagher."

We think it is proper for us to call the attention of this court to the decisions of the Kansas Supreme Court in cases of this character. The case of *McMullen* v. *Railway Co.*, 107 Kan. 274, is practically on all fours with the case at bar. About the only difference we can find is that in the McMullen case *the accident happened in a yard* while in this case the accident happened *at a way station.* The reasoning in this case, we believe, will commend itself highly to this court. A brief statement of the facts in the McMullen case is that McMullen was a brakeman for the Santa Fe and was working in the yards at Emporia, Kansas, helping make up a freight train. It was his duty, when the train was made up, to go to the rear end of the

train and close the stop cock and couple up the air hose. The evidence showed that it was customary for trainmen in making up trains in yards to have recourse to the method of kicking in cars. McMullen knew of this action. He was found dead. No one *saw the accident.* The jury found the train crew guilty of negligence. A verdict was rendered for plaintiff and affirmed by this court. *It was a no-eye-witness case.* The law is that Mr. Toops was presumed to be exercising reasonable care, and there is absolutely no testimony to the contrary. He was presumed to be in the line of his duty and we have shown that the line of his duty would require him to be in the position where he was found, at sometime or other. So we believe the presumption is fully carried out that he was in the line of his duty. We quote from the McMullen case, page 280:

> "Counsel for the defendant in their brief say: 'There was no eyewitness to the accident nor was there any testimony as to how it occurred. It may be assumed, however, that very shortly after the conductor and brakeman left the way car, he left the car and closed the angle cock and at that time the cars were kicked in on track 4, and by the impact, while he was between the rails on track 4, and at the rear end of the way car, was knocked down and run over. This assumption is based entirely on the situation appearing after the accident. * * * The duty of the conductor and brakeman of the train crew was to examine the seals and check the cars in the train, and that of McMullen was to close the angle cock, hang up the tail hose, and couple up the air hose on the train. This was usually done after the train was made up and just before or after the road engine

was attached to the train. Although, from what he told Dr. Eckdall, it was not the proper time to do so, he thought it had to be done and he would perform that duty while the train was being made up.'

"From all this testimony and the rules of the company referred to, and the condition of affairs assumed by counsel for defendant, it seems unreasonable to hold that McMullen was not engaged in the performance of his duty when injured, or that he was not located and engaged as the switch crew knew he or some other brakeman ought to be.

"While it may not have been the duty of the switch crew to keep a lookout under ordinary circumstances for a member of the train crew attending to the air couplings, the violent collision caused by the wrong signal and its effects were such as to make it a question for the jury whether such operations were negligent or not (*Sarr* v. *Railway Co.*, 97 Kan. 441, 155 Pac. 954).

"But it is urged that the negligence on which the jury based the verdict was other than that alleged in the petition. We hold, however, the charge that the switch engine and cars were shoved at a dangerous rate of speed and run with great force and violence without warning against the other cars of the train causing the way car suddenly and violently to move backwards over the body of McMullen, fairly includes the cause of such alleged violence, which was the transmission of the wrong signal (*Linker* v. *Railroad Co.*, 82 Kan. 580, 109 Pac. 678).

"It is also urged that the deceased assumed the risk, thereby exonerating the defendant. In *Spinden* v. *Railway Co.*, 95 Kan. 474, 148 Pac. 747, we held that in an action under the Federal Employer's Liability Act it was error to instruct that the assumption of risk could only be established by showing that its danger was so glaring that a person of ordinary prudence would not have at-

tempted it. In the opinion it was said: 'The employee is not regarded as assuming unknown or unappreciated risks from his employer's neglect, unless they are so obvious that an ordinarily prudent person would observe and appreciate them' (p. 476).

"The Federal Supreme Court, in *Seaboard Air Line* v. *Horton*, 233 U. S. 492, held that Congress in enacting this legislation based the action upon negligence only, and excluded responsibility of the carrier to its employees for defects not attributable to negligence. Touching risks not naturally incident to the occupation it was: 'These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them' (p. 504).

"The same court, in *Reese* v. *Phila. & Reading Ry.*, 239 U. S. 463, held that a railroad is bound to exercise under the circumstances the care towards its employees 'which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures' (Syl. Section 1) and that failure to exercise this care constituted negligence."

In the McMullen case the court cites the case of *Ches. & Ohio Ry.* v. *DeAtley*, 241 U. S. 310. To our way of thinking the DeAtley case is a much stronger case for the railroad company than either the McMullen case or the case here on review, but the Supreme Court of the United States found for the plaintiff, saying:

"'It is insisted that the true test is, not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended;

whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents to have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them' (p. 315)."

The court also said:

"'Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence' (p. 317)."

The Kansas Supreme Court in the case of *Burks* v. *Santa Fe,* 83 Kan. 144, had before it for decision a case in which no one saw the actual accident. A freight conductor was killed by stepping between two cars. The facts in that case disclosed that the cars were equipped with coupling apparatus which was supposed to operate automatically. An eye witness thought Burks tried to raise the lever as the train approached the car, then stepped between the cars and was caught as they came together. Close to his feet were found, near the middle of the track, a lump of coal. It had the appearance of being scraped as though

someone had stepped upon it. It showed that a foot had slipped upon it and there was a mark near it showing that someone had slipped. Who slipped on the stone was not known or shown. The track at this place was not well kept and the evidence showed that from time to time lumps of coal of various sizes had been scattered along the track and then someone would come along and pick it up. The court said that the evidence that Burk was seen trying to raise the lever and then stepped between the rails, justified an inference that he went between the cars because the coupling device or lever had failed to work. On page 146 the court said:

> "Contributory negligence being an affirmative defense, the burden of proving which rests on the defendant, the court cannot treat it as conclusively established so long as the evidence is open to any other reasonable view. * * * The evidence bearing upon the cause of the accident was meager. Its substance has already been stated. The jury were justified in believing that Burks, who was said to have been an unusually careful and prudent man, would not have been caught and crushed between the cars except for the intervention of some unusual agency. The lump of coal lying near his feet, bearing the indications of having been stepped upon, together with the mark in the soil showing where a foot had slipped, gave room for a reasonable inference, in the absence of any more probable solution of the problem, that he had stumbled upon and fallen over it.
>
> "A more difficult question is whether the evidence warranted a finding that the company was negligent in respect to the condition of the track. There was nothing to show that this particular lump of coal had ever before been seen there. The testimony as to its weathered condition pos-

sibly authorized a deduction that it had been lying on the ground for some time. At all events there was an abundant showing that pieces of coal of similar size were habitually permitted to remain between the rails indefinitely, among grass and weeds that would necessarily hide them to some extent. The company must be deemed *to have had knowledge* of the continuous existence of the vegetation and the frequent presence of lumps of coal. *Whether the condition of the track showed a want of due care, and whether it occasioned the death of Burks, were questions for the consideration of the jury.* In the defendant's brief it is said:

> 'A little-used sidetrack at a small station presents a radically different situation from that of tracks in large railroad yards where many employees are constantly passing to and fro, and where, no doubt, there is at least a custom, if not a legal duty, to provide for inspection of the tracks.'

"What precautions are necessary, in order that it may be said that ordinary diligence has been shown in the inspection and care of the surface of a railroad track, doubtless depends to some extent upon the frequency of its use (*Williams* v. *The St. L. & S. F. Ry. Co.*, 119 Mo. 316, 322). *But just where the line should be drawn is a question of fact for the determination of the jury, rather than of law to be settled by the court*" (our italics).

So in the case at bar, we believe that both the court and the jury were justified in believing that Toops, who was shown to be a careful and prudent man, would not have been killed except for the intervention of some unusual agency, in this instance the defective condition of the track and the negligence of

the crew in kicking the cars down upon him without warning and without protecting the moving end thereof, as found by the jury. Their finding was amply sustained by the evidence.

The Kansas Supreme Court has not been unmindful that facts may be proved by circumstances, and that the fact that a given accident was unseen by anyone, does not preclude a recovery. We quote now from the case of *Foley* v. *Crawford*, 125 Kan. 252.

> (P. 259): "The defendant says: 'No allegation in his (the plaintiff's) petition was made as to what acts of negligence alleged were the proximate cause of death. . . . . And no proof was adduced that the acts of negligence alleged were the proximate cause of death.' The defendant filed a demurrer to the evidence of the plaintiff; that demurrer was overruled. The Amusement Syndicate Company argues that the evidence was insufficient to entitle the plaintiff to recover. Most of the facts surrounding the death of Joe Foley were conclusively established by the evidence. There was no dispute about them; but the evidence did not establish what caused him to fall or get out of the elevator and to the bottom of the elevator shaft. There was nothing to show that fact except the conclusively established facts. Those facts showed that he was instantly killed; that he was killed by being knocked out of, by jumping out of, or by falling out of the elevator to the bottom of the shaft. He could not have been knocked out, could not have jumped out or fallen out of the elevator if there had been a door to it, and the door had been closed. Probably the accident could not have occurred if there had been doors to the elevator shaft. The evidence tended to prove that the control of the elevator was not working properly. It was negligence for the defendant to operate the elevator without doors to the elevator

shaft, without a door on the elevator, or without proper control. The circumstances tended to prove that all of these three factors contributed to the death of Joe Foley. All three factors were alleged in the petition and were proved by the evidence. There was nothing to show contributory negligence on the part of Joe Foley. The evidence was sufficient to establish a case in favor of the plaintiff, and the demurrer thereto was properly overruled."

The question of whether or not circumstances in a case are sufficient upon which to base the findings of the jury was decided by the United States Circuit Court of Appeals in the case of *Cincinnati, N. O. & T. P. R. R. Co.* v. *Jones*, 113 C. C. A. 55, 192 Fed. Rep. 769, 47 L. R. A. (N. S.) 483. The facts are substantially as follows:

Jones brought the action to recover damages for the negligent killing of a man named Winters on the night of October 8, 1907. Winters was a brakeman and had been in the employ of the company for about 8 days. The company's track ran through several tunnels between Pine Knot, Kentucky, and Oakdale, Tennessee. Among them were tunnels No. 22, No. 23 and No. 24. The ceiling of tunnel No. 23 was low. Winters was last seen with his lantern on top of the train at a point several hundred feet back of the locomotive. It was proper for him to be on the train. Winters' body was found the next day about 200 feet from tunnel No. 24. There was a large gash over his right eye. Signs of blood were found on a piece of wood lying in the middle of tunnel No. 23, and also from the south end of the tunnel along the track to a point near the

mouth of tunnel No. 24. Tunnel No. 23 was 800 feet long. There was considerable testimony and conflicting testimony about the clearance in the tunnel. The railroad company filed a demurrer and moved for a directed verdict on the testimony, but it was refused and judgment rendered for the plaintiff. The only reason we are citing this case is to show the inferences in which the court indulged. Commencing on page 491, the opinion reads as follows:

> "The inquiry becomes pertinent, then, as to what part of the roof he in fact was occupying when he received the injury. Every part of a box car on which he could in our judgment have been, has been eliminated except the running board. He was not standing on the running board; this brings us to the point on which the decision must turn. Winters was not told or warned of the fact that any portion of the roof of any tunnel on the road, much less that any portion of the roof of tunnel No. 23, was lower than the roof was at the tunnel entrances; and yet, at the middle of tunnel No. 23 the portion of the roof over the track was 15 inches lower than it was at the north entrance. If Winters had been struck at the north entrance of the tunnel, it is hardly conceivable that the first appearance of bloodstains would have been found on the stick of wood near the middle of the tunnel, or that the continuous line of bloodstains found on the east side of the track would not have appeared before the south end of the tunnel was reached. The rational inference is that Winters' head struck the interior low portion of the tunnel roof. The first appearance of blood was discovered on the stick of wood found on the east side of the track at that place; and the fact that no sign of blood was found between that point and at the end of the tunnel reasonably tended to show that the blood found on the stick of wood came

from a spurt of blood caused by the stroke, and that the rest trickled over the roof and finally fell to the ground as the car passed out of the tunnel. Since we must assume for reasons before stated, that at the time he was struck he was not standing, the question whether he could have been struck while sitting becomes immaterial. The fact remains that he could, consistently with the warning he had received, have kept his body in some position (other than a sitting posture) similar to the one that he might well have taken when he safely passed into the tunnel, and still have been struck by the protruding portion of the tunnel roof. Testimony tending to show that other employees did not even sit in an upright position on the running board, when passing through this tunnel, cannot affect the right of recovery respecting one who does not appear to have had knowledge or means of knowing of the low portion of the roof in question. True, it is shown that Winters must have passed through this tunnel twice every twenty-four hours during his short service, and it is also to be inferred that he made trips over the road before he entered into defendant's employ; but it is not shown whether he passed through it in the daytime, or that the low projection was visible during the daylight. True, also, defendant maintains telltales at suitable distances from the tunnel entrances, but they served only as warning of approach to the tunnels; they were not calculated to give notice of any obstruction within the tunnel. Further, the car on which Winters was riding was not identified, and the fact appears that box cars vary in height. When these facts are considered, testimony showing distances between the running board and the low portion of the roof tend to confuse, rather than to show anything calculated to elucidate, the questions alike of defendant's negligence and Winters' assumption of risk or his contributory negligence. The proofs were fatally lacking respecting the car or the height of the car

on which Winters was riding. Hence, the question at last comes to this: Whether the defendant could maintain this tunnel roof with its central portion 15 inches lower than the roof is at the north entrance to the tunnel, and escape liability without showing that the person injured was either told of it, or was clearly chargeable with knowledge of it."

We believe that our theory of the Toops case and our explanation of the absence of blood on the front of the car that struck him, is true. The fact that a mashed wound of the kind suffered by Toops will not bleed instantly, and the fact that blood was positively found on every car except the front car, would not preclude the fact that his head was severed by the first car.

Other cases in point on the assumption of risk and on the negligence of defendants are:

Pennsylvania Ry. Co. v. *Goughnour,* 126 C. C. A. 39, 208 Fed. 961.

Hardwick v. *Wabash R. Co.,* 181 Mo. App. 156.

Southern Ry. Co. v. *Smith,* 123 C. C. A. 488, 205 Fed. 360.

McDonald v. *Ry. T. Co.,* 121 Minn. 273.

Bonbolis v. *Minneapolis & St. L. R. Co.,* 150 N. W. 385.

Thornton v. *Seaboard A. L. Ry. Co.,* 6 N. C. C. A. 85n, 93n, 82 S. E. 433.

Louisville & N. R. Co. v. *Johnson's Admx.,* 171 S. W. 487.

In *Pennsylvania Ry. Co.* v. *Goughnour,* above cited, Sections 1, 3 and 5 of the syllabus read:

"1. In an action for injuries to a freight conductor under the Federal Employers' Liability Act, plaintiff cannot be held to have assumed

the risk of the negligence of his flagman, his fellow servant, in failing to protect the rear of the train while standing on a main track.

"3. Where a freight conductor was caught and injured between his engine and the caboose by the engine being struck by a train approaching from the rear, due to flagman's failure to protect the rear end of the train, the flagman's negligence, under the Federal Employers' Liability Act, was the negligence of the railway company as a matter of law.

"5. Where a freight conductor was caught and injured between his engine and the caboose by the engine being struck by a following train, and the court properly submitted the question of the conductor's contributory negligence in failing to see that the flagman performed his duty to protect the rear end of the train to the jury, a charge that if, under the circumstances, the conductor's negligence contributed either in whole or in part to the injury, the jury, under the Federal Employers' Liability Act, should reduce plaintiff's recovery *pro tanto, the court did not err in affirming one of plaintiff's points that the conductor was entitled to assume, when he went between the engine and the caboose, that the flagman would obey the rules of the company and perform his duty to flag the following train*" (our italics).

And so in the instant case, Conductor Toops had a right to assume that his train crew would obey the rules of the company.

We call the court's special attention to the answer to question No. 10 set out in the record, page 76, for the reason that it is incomplete. The abstractor for the petitioner omitted a part of the answer. The complete answer appears in our counter abstract

on page 82 of the record. The part omitted from said answer reads as follows:

> "Third, poor condition of the track at derail switch."

In conclusion, we call the court's special attention also to the opinion of the Supreme Court of Kansas in the instant case (R. 91). This opinion was written by Mr. Justice Hopkins (who is now our new Federal Judge of Kansas), and it is a very able and analytical opinion and should be sustained and affirmed by this court.

Respectfully submitted,

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